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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

*Plaintiff,*

v.

KENNETH L. SCHROEDER,

*Defendant.*

No. C 07 3798 JW

**REPLY MEMORANDUM IN SUPPORT OF  
MOTION OF KENNETH L. SCHROEDER  
TO COMPEL FURTHER RESPONSES TO  
DISCOVERY REQUESTS (TESTIMONY  
AND DOCUMENTS) BY (1) KLA-TENCOR  
CORPORATION AND (2) SKADDEN,  
ARPS, SLATE, MEAGHER & FLOM LLP,  
ATTORNEYS FOR THE SPECIAL  
COMMITTEE OF KLA'S BOARD OF  
DIRECTORS**

**Fed. R. Civ. P. 37(a)(3)(B) and 45(c)(2)(B)(i)**

Date: September 23, 2008  
Time: 10:00 a.m.  
Courtroom: 2  
Judge: Magistrate Judge Howard R. Lloyd

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Defendant Kenneth L. Schroeder respectfully submits this Reply Memorandum in support of the Motion of Kenneth L. Schroeder to Compel Further Responses to Discovery Requests (Testimony and Documents) By (1) KLA-Tencor Corporation and (2) Skadden, Arps, Slate, Meagher & Flom LLP, Attorneys for the Special Committee of KLA's Board of Directors (the "Motion to Compel").<sup>1</sup>

## **I. INTRODUCTION**

The two separate briefs filed by KLA and Skadden in opposition to Mr. Schroeder's Motion to Compel discovery fail to justify any further withholding of the documents and testimony that Mr. Schroeder has sought from them pursuant to subpoena. In one opposition brief, KLA seeks to avoid a ruling on what has clearly been a pervasive waiver of the attorney-client privilege. KLA's waiver of the attorney-client privilege results from its production of purportedly privileged documents to the government and its authorizing the Company's former General Counsel and others to submit to SEC interviews wherein they have disclosed privileged communications without asserting any privilege. In its opposition brief, Skadden attempts to evade production of original interview notes and draft memoranda that formed the basis for the Final Interview Memoranda that it produced to the government — based entirely on its self-serving but unsupported and counterfactual assertions that the notes and drafts consist solely of "opinion" work product not susceptible to subject matter waiver. Both KLA and Skadden have failed to carry their burden of demonstrating privilege and non-waiver. The Court should grant the Motion to Compel in its entirety.

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<sup>1</sup> As explained in detail in the Motion to Compel, Mr. Schroeder seeks an order compelling KLA-Tencor Corporation ("KLA" or "the Company") and Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") to provide Mr. Schroeder with documents and testimony that they have so far refused to provide him based on claims of attorney-client privilege and/or work product protection. The documents and testimony that Mr. Schroeder seeks fall into five general categories: (1) all documents and communications concerning historical attorney communications about KLA's stock option granting and accounting practices; (2) all original notes and draft interview memoranda from, as well as testimony about, Special Committee witness interviews; (3) all documents and communications relating to the Special Committee investigation shown to or discussed with any government or regulatory agencies; (4) all other documents and communications relating to the Special Committee investigation; and (5) all documents and communications shared with KLA's outside auditors.

1           **A. KLA's Opposition**

2           In its opposition brief,<sup>2</sup> KLA takes pains to try to avoid a decision on the merits of the  
3 Motion to Compel and on Mr. Schroeder's claim that it has broadly waived the attorney-client  
4 privilege regarding option-related communications. KLA's attempts to prevent a ruling on the  
5 validity of its privilege claims should be rejected.

6           First, KLA argues that the Motion to Compel is moot as to it because KLA has offered to  
7 permit Mr. Schroeder to obtain the testimony he seeks about historical attorney communications  
8 concerning KLA's stock option grant practices, on the condition that Mr. Schroeder enter into a  
9 broad and restrictive confidentiality agreement and protective order. But KLA's attempt to  
10 condition Mr. Schroeder's access to the discovery to which he is entitled on his stipulating to an  
11 overreaching confidentiality agreement and protective order that would severely restrict  
12 Mr. Schroeder's use of that discovery is unacceptable and does not moot any part of the Motion  
13 to Compel.

14           Second, KLA urges the Court to deny the Motion to Compel because it contends  
15 Mr. Schroeder did not meet-and-confer to the extent KLA thinks he should have before filing the  
16 Motion. This argument is a red herring. Mr. Schroeder's counsel conferred extensively with KLA  
17 and Skadden on their pervasive subpoena objections and also gave KLA almost two weeks'  
18 notice before filing the Motion to Compel. KLA informed Mr. Schroeder only *after* he filed the  
19 Motion to Compel that it believed that further meet-and-confer sessions were required. In all  
20 events, contrary to KLA's claims, additional meet-and-confer discussions would not have avoided  
21 this Motion. KLA and Skadden have brought discovery to a halt with their pervasive privilege  
22 objections. The parties have fundamental differences on the issues and require a ruling, not  
23 endless conferences.

24           Third, KLA claims that the Court can avoid ruling on attorney-client privilege issues  
25 because Mr. Schroeder, as a former KLA officer and director, has a qualified right of access to  
26

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27           <sup>2</sup> See Non Party KLA-Tencor Corporation's Opposition to Kenneth L. Schroeder's Motion to  
28 Compel ("KLA Opp.") (docket no. 84).

1 the communications even if they are subject to a valid claim of privilege. But Mr. Schroeder  
 2 contends that KLA has broadly waived the attorney-client privilege, and a determination of  
 3 waiver once and for all would provide him with an unfettered, not qualified, right to discover and  
 4 use the information he seeks to defend himself. Unless and until this Court rules that KLA has  
 5 carried its burden of proving that it has a valid, unwaived privilege precluding the discovery that  
 6 Mr. Schroeder seeks, KLA should not be allowed to place conditions on providing that discovery.

7 \* \* \*

8 On the merits, KLA claims, for the first time, that its production of documents to the  
 9 government was “involuntary” and “coerced” because, at the time KLA produced documents to  
 10 the government, federal regulators considered a company’s willingness to waive the attorney-  
 11 client privilege as one of a number of factors in determining whether the company had given the  
 12 government its cooperation, which was, in turn, one among a multitude of factors that informed  
 13 charging and enforcement decisions. KLA’s argument fails as a matter of both law and fact. The  
 14 government has for many years considered a corporation’s willingness to waive privilege as one  
 15 of many factors in determining whether the corporation fully cooperated with a federal  
 16 investigation. KLA cannot point to a single federal case holding that production of privileged  
 17 documents to the government was “coerced” as a result of those policies. Moreover, there are  
 18 simply no facts in the record to suggest that KLA was coerced in any way when it hastened to  
 19 volunteer production of documents to the government on which it now claims privilege.<sup>3</sup>

20 **B. Skadden’s Opposition**

21 In its opposition brief,<sup>4</sup> Skadden adds nothing to KLA’s non-waiver arguments. Skadden

22  
 23 <sup>3</sup> KLA’s substantive non-waiver arguments are little more than an afterthought in its opposition  
 24 brief. KLA argues briefly that its voluntary production to the SEC and the DOJ did not constitute  
 25 a waiver of the attorney-client privilege as to Mr. Schroeder (1) because KLA shared a “common  
 26 interest” with the government, and (2) because its production to the government was merely a  
 limited, “selective waiver.” But, as Mr. Schroeder explained at length in the Motion to Compel,  
 federal courts throughout the country (including many courts in this district) have persuasively  
 rejected both of KLA’s arguments on similar facts.

27 <sup>4</sup> See Memorandum of Points and Authorities in Support of Skadden, Arps, Slate, Meagher &  
 28 Flom LLP’s Opposition to Kenneth L. Schroeder’s Motion to Compel (“Skadden Opp.”) (docket  
 no. 88).



1 instead devotes its brief to arguing that, even if KLA and the Special Committee broadly waived  
2 the attorney-client privilege and work product protection by voluntarily producing documents to  
3 the government, Skadden is entitled to withhold from Mr. Schroeder the notes of its Special  
4 Committee interviews, draft interview memoranda, and testimony about the notes and  
5 memoranda, because they are “opinion” work product to which the doctrine of subject matter  
6 waiver cannot apply.

7 As an initial matter, the Court need not reach Skadden’s “opinion” work product  
8 arguments, because Skadden has failed to meet its initial burden of showing that any of the  
9 discovery that it has withheld from Mr. Schroeder is entitled to protection as work product in this  
10 lawsuit. Because KLA, the Special Committee, and Skadden are not parties to this litigation,  
11 Ninth Circuit law does not permit them to use the work product doctrine to withhold discovery in  
12 this case. Moreover, as Mr. Schroeder explained in his opening brief, documents created with the  
13 purpose of disclosure to the government, such as Skadden’s documents relating to the Special  
14 Committee investigation, are not entitled to work product protection.

15 Skadden has also failed to make the required showing that the withheld notes, draft  
16 interview memoranda and testimony — if work product at all — are “opinion” work product, and  
17 not mere “fact” work product. Attorney notes and memoranda are not, as Skadden hopefully  
18 suggests, categorically classified as “opinion” work product. Notes and memoranda created by an  
19 attorney acting as scrivener to memorialize a witness’ statements do not contain the note-taker’s  
20 “mental impressions,” and boilerplate, *ipse dixit* assertions that the note-taker relied on his or her  
21 understanding of “legal and factual issues” when writing down what the witness said do not  
22 transform factual summaries into opinion work product.

23 Skadden also argues that the doctrine of subject matter waiver does not require it to  
24 produce the notes, draft memoranda, and testimony Mr. Schroeder requests in any event, because  
25 Mr. Schroeder has not shown any “unfairness” resulting from its failure to produce them. To the  
26 contrary, fairness requires that Mr. Schroeder be entitled to see the interview notes and draft  
27 memoranda, which are indisputably the closest to what the witnesses actually said, where (1) the  
28 SEC plans to take the deposition of a Skadden note-taker to discover precisely what

1 Mr. Schroeder said in an interview, and Mr. Schroeder needs to be in a position to fully cross-  
 2 examine her; (2) Mr. Schroeder needs the notes to cross-examine other percipient witnesses; (3)  
 3 the memory and credibility of many witnesses are key factors; (4) the government had  
 4 contemporaneous, unfettered access to witnesses and supposedly privileged information; and (5)  
 5 the government relied heavily on the edited, Final Interview Memoranda in making its allegations  
 6 in the case.

7 The Court should grant Mr. Schroeder's Motion to Compel in its entirety.

## 8 **II. ARGUMENT**

### 9 **A. The Court Should Order KLA To Provide The Requested Discovery**

#### 10 **1. Mr. Schroeder's Motion To Compel Is Not Moot As To KLA**

11 A claim or issue is moot only if the party alleging mootness shows that there is no present  
 12 controversy as to which a court can grant effective relief. *See Council of Ins. Agents & Brokers v.*  
 13 *Molasky-Arman*, 522 F.3d 925, 933 (9th Cir. 2008). Incomplete responses and other half-  
 14 measures that do not fully resolve discovery disputes do not render a motion to compel moot. *See*  
 15 *Ashker v. Alameida*, No. C 05-03759 CW (EDL), 2007 WL 4287330, \*1 (N.D. Cal. Dec. 5, 2007)  
 16 (rejecting claim that motion to compel was moot where defendant had attempted to place  
 17 "unilateral limitation" on plaintiff's discovery requests).<sup>5</sup>

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18  
 19  
 20 <sup>5</sup> The cases that KLA cites in its opposition brief to support its mootness claim wholly fail to  
 21 support KLA's position. At most, those cases stand for the basic proposition that a motion to  
 22 compel may become moot where the parties voluntarily resolve their discovery dispute, or where  
 23 the withholding party withdraws its objections or provides all of the discovery requested on the  
 24 terms requested. *See Schmidt v. Levi Strauss & Co.*, No C-04-01025, 2007 WL 518600, \*1 (N.D.  
 25 Cal. Feb. 13, 2007) (designated not for citation) (finding motion to compel moot only as to issues  
 26 on which "[t]he parties reached agreement"); *United States v. Bergonzi*, 403 F.3d 1048, 1049-50  
 27 (9th Cir. 2005) (dismissing company's appeal of order granting motion to compel as moot, and  
 28 declining to consider company's request for protective order, where company dropped challenge  
 to district court ruling ordering disclosure); *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57,  
 64 n.10 (Fed. Cl. 2003) (motion to compel partially moot where withholding party agreed that  
 withheld document "isn't privileged" and produced document); *Howard v. Rustin*, No. 06-00200,  
 2008 WL 2008937, \*2 (W.D. Pa. May 2, 2008) (motion to compel partially moot where  
 withholding party agreed to provide discovery requested). In *Pucket v. Hot Springs School*  
*District No. 23-2*, 239 F.R.D. 572, 579 n.1 (D.S.D. 2006), upon which KLA also relies, the court  
 simply declined to rule on a privilege issue because the party arguing waiver had not moved to  
 compel any discovery about the purportedly privileged communications.

1 KLA claims that the Motion to Compel is moot as to it because Mr. Schroeder already  
 2 received all of the documents reflecting historical attorney communications concerning KLA's  
 3 stock option grant process that KLA is withholding under a claim of privilege,<sup>6</sup> and because  
 4 "KLA has repeatedly assured counsel for [Mr.] Schroeder that it will not assert attorney client  
 5 privilege objections should he attempt to elicit testimony from current and former KLA witnesses  
 6 regarding KLA's option practices." KLA Opp. at 10. In fact, KLA has given Mr. Schroeder no  
 7 such assurances. Rather, KLA has informed Mr. Schroeder that it will permit him to question  
 8 KLA witnesses about attorney communications concerning KLA's option grant processes *only* if  
 9 Mr. Schroeder agrees to a sweeping confidentiality agreement and protective order. KLA's  
 10 counsel has provided Mr. Schroeder's counsel with drafts of proposed confidentiality agreements  
 11 setting out the terms on which KLA would permit Mr. Schroeder to obtain the deposition  
 12 testimony that he seeks, but those drafts contained numerous restrictions that were not acceptable  
 13 to Mr. Schroeder. *See* Declaration of Shirli F. Weiss ("Weiss Decl.") ¶ 7.

14 KLA volunteered purportedly privileged communications to the SEC, which published  
 15 selected portions of them out of context to change their meaning and commented upon them  
 16 publicly against Mr. Schroeder,<sup>7</sup> but KLA now insists that Mr. Schroeder be required to agree to  
 17 heavy restrictions, including that he would effectively have to defend himself under seal, shielded  
 18 from public view. Mr. Schroeder is not required to participate in KLA's fiction that anything

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19  
 20 <sup>6</sup> As Mr. Schroeder explained in the Motion to Compel, Mr. Schroeder does not seek to require  
 21 KLA to re-produce any documents that Mr. Schroeder has already received from the SEC. *See*  
 Motion to Compel at 21 n.20.

22 <sup>7</sup> *See, e.g.,* Siobhan Hughes, *3rd UPDATE: SEC CHARGES Former KLA-Tencor CEO In*  
*Backdating*, Wall Street Journal Online, July 25, 2007 (attached as Exhibit 1 to the June 9, 2008  
 23 Declaration of Jeffrey B. Coopersmith) ("Coopersmith Decl.") (docket no. 76) (quoting SEC  
 24 assistant regional director as stating: "At least here, the CEO was correctly advised not to  
 backdate, and how to properly disclose the company's stock options practices. He chose to  
 25 ignore that advice."); *see also SEC Charges Former KLA-Tencor CEO With Fraud For Improper*  
*Stock Options Backdating: Commission Also Settles Claims Against KLA-Tencor*, SEC Litig.  
 26 Release No. 2007-143 (July 25, 2007) (Coopersmith Decl. Ex. 2) (quoting Director of  
 Enforcement Linda Chatman Thompson, following references to alleged communications from  
 27 KLA's General Counsel, as stating: "KLA dramatically overstated its reported financial results,  
 28 depriving investors of accurate information about the company's compensation costs and  
 financial performance. It is especially troubling for a public company to engage in such  
 misconduct even after being cautioned that these practices were impermissible.").

1 relating to KLA's stock option granting processes remains privileged in this case or to indulge  
 2 KLA's charade that placing things under seal at this point somehow cures its massive waiver of  
 3 privilege.

4 Because KLA and Mr. Schroeder have a continuing dispute over the discovery  
 5 Mr. Schroeder seeks, no part of the Motion to Compel is moot.

6 **2. Mr. Schroeder Fully Satisfied His Meet-And-Confer Obligations**

7 KLA claims that the Court should deny the Motion to Compel because the months-long  
 8 meet-and-confer process that preceded the Motion to Compel was somehow insufficient to satisfy  
 9 the meet-and-confer obligations imposed by Federal Rule of Civil Procedure 37 and Civil L.R.  
 10 37-1. KLA's argument is simply an attempt to forever avoid a ruling on its privilege waiver.

11 As set forth in the Rule 37 certification filed by Mr. Schroeder's lead counsel with the  
 12 Motion to Compel, counsel for Mr. Schroeder met and conferred extensively with both Skadden  
 13 and counsel for KLA from November 2007 through January 2008 about their pervasive  
 14 objections to discovery based on privilege. *See* Certification of Shirli F. Weiss, dated June 9,  
 15 2008 (attached to the Motion to Compel). After KLA and Skadden rebuffed Mr. Schroeder's  
 16 repeated efforts to obtain necessary discovery, Mr. Schroeder's counsel concluded, upon a review  
 17 of applicable law, that KLA's selective use of the attorney-client privilege and work product  
 18 protection against Mr. Schroeder worked to deprive Mr. Schroeder of his constitutional right to  
 19 due process, and Mr. Schroeder accordingly moved to dismiss the SEC's Complaint on February  
 20 1, 2008. As explained in greater detail in the Motion to Compel, Judge Ware denied the Motion  
 21 to Dismiss without prejudice on May 22, 2008, on the ground that Mr. Schroeder should file a  
 22 motion to compel before seeking dismissal of the Complaint. *See* Order Denying Defendant's  
 23 Motion to Dismiss (May 22, 2008) ("May 22 Order") (docket no. 73), at 8-9. Mr. Schroeder filed  
 24 the Motion to Compel on June 9, 2008.

25 KLA does not claim that Mr. Schroeder's meet-and-confer efforts were inadequate *per se*,  
 26 nor could it. KLA instead argues that several significant events — the settlement of shareholder  
 27 class action litigation and the filing of a motion to terminate and approve settlements by KLA's  
 28 Special Litigation Committee in the federal derivative litigation — caused KLA to significantly

1 change its position concerning Mr. Schroeder's discovery requests. Although it is not surprising  
2 that KLA has largely abandoned the indefensible privilege position it took previously, *see, e.g.*,  
3 Motion to Compel at 10-14, KLA is incorrect that Mr. Schroeder failed to meet and confer on  
4 those issues. Mr. Schroeder's counsel told KLA counsel well in advance that the Motion to  
5 Compel would be filed and negotiated the hearing date with them, but KLA approached  
6 Mr. Schroeder with its proposal to produce privileged communications under a restrictive  
7 protective order only *after* Mr. Schroeder filed the Motion to Compel. *See* Weiss Decl. ¶¶ 3-6.  
8 Moreover, Mr. Schroeder and KLA have conferred extensively on numerous occasions since the  
9 Motion to Compel was filed, yet they remain unable to resolve their disputes. Weiss Decl. ¶ 7.

10 **3. Any Qualified Right Of Access Does Not Provide Complete Relief**

11 KLA also asserts that the Court can avoid ruling on its privilege claims because, as a  
12 former KLA officer and director, Mr. Schroeder has a qualified right of access relating to  
13 historical communications concerning KLA's stock option grant processes that were created  
14 during Mr. Schroeder's tenure at KLA. *See* KLA Opp. at 15-17. In addition, KLA asserts that  
15 Mr. Schroeder has a concomitant obligation to protect the confidentiality of any such discovery  
16 that he receives from KLA. KLA Opp. at 17.

17 Although Mr. Schroeder does not disagree that he a right to access all attorney  
18 communications created during his tenure (as well as to testimony about those communications),  
19 especially here, where KLA has precipitated this lawsuit against him by distorting those  
20 privileged communications to the SEC, that qualified right does not permit KLA to avoid a ruling  
21 on whether the discovery that it has withheld from Mr. Schroeder is subject to a valid, unwaived  
22 privilege claim, for the same reasons that KLA's mootness argument fails. Allegedly privileged  
23 communications were provided to the government and were publicly and selectively used to  
24 condemn Mr. Schroeder in connection with this lawsuit. KLA thus waived any privilege that may  
25 have attached to those communications, and absent a legitimate, unwaived basis for protecting  
26 those communications from disclosure, KLA cannot prevent Mr. Schroeder from conducting his  
27 defense — and rebutting erroneous interpretations of those communications — in the public  
28 record.

The cases that KLA cites do not support its claim that recognition of a qualified right of access obviates the need to rule on KLA's privilege claims. Those cases addressed only whether a former officer or director was entitled to *access* allegedly privileged documents and communications; they did not resolve questions concerning the *use* of those documents and communications. *See People v. Greenberg*, 851 N.Y.S.2d 196, 205 (N.Y. App. Div. 2008) (Friedman, J., concurring) ("It should be noted that, at this juncture, we are called upon to determine only whether Greenberg and Smith are entitled to production of the documents in question. What use, if any, the former directors may make of such documents, or of the legal advice reflected therein, in defending this action, is a question for another day."); *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992) (discussing former officers' and directors' right to "inspect[] documents generated during their tenure"). Accordingly, even if the Court granted Mr. Schroeder access to discovery about historical KLA attorney communications on this basis, the parties would be back before the Court shortly to litigate KLA's proposed restrictions on Mr. Schroeder's use of the documents to cross-examine witnesses and, inevitably, whether KLA waived any privilege.

**4. KLA Waived Any Attorney-Client Privilege As To The Discovery Sought<sup>8</sup>**

**a. KLA's Voluntary Production To The Government**

KLA claims that it should not be found to have waived any applicable attorney-client privilege or work product protection based on its production of privileged documents to the SEC and the DOJ because its disclosures to the government were "involuntary" disclosures. *See KLA Opp.* at 18-22. It may be that truly compelled or involuntary disclosure does not waive the attorney-client privilege or the work product protection, but that general principle does not help KLA here because its disclosures to the SEC and the DOJ were voluntary; they were the product

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<sup>8</sup> Because only KLA makes substantive arguments concerning whether the production of documents to the government in this case waived any applicable privilege, Mr. Schroeder addresses his waiver arguments exclusively to KLA in this reply brief. All such arguments apply with equal force to Skadden's assertions of the work product protection, however.



1 of the KLA's calculated, self-interested, and ultimately successful strategy to trade cooperation  
2 for indulgence from the government. KLA has provided absolutely no evidence that would  
3 support its claim that the government coerced KLA in any way to provide it with privileged  
4 documents and testimony. In fact, KLA publicly disclosed that it was fully cooperating with the  
5 government in its investigations and never so much as hinted that its cooperation with the  
6 government was anything less than voluntary until very recently, in its opposition to the Motion  
7 to Compel. KLA's claim of involuntary production has no basis in law or fact, and the Court  
8 should reject KLA's belated, opportunistic attempt at revisionist history.

9 Corporations facing government investigations and their potential consequences have long  
10 grappled with difficult decisions concerning the extent to which they cooperate with the  
11 government by, for example, sharing with the government documents or communications that  
12 might otherwise be shielded from disclosure by the attorney-client privilege or the work product  
13 doctrine. As federal courts have long recognized, when a corporation elects to waive the  
14 attorney-client privilege and work product protection as part of its cooperation with a government  
15 investigation, it does so in the hope of obtaining something in return — favorable treatment by  
16 the government. *See In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (“Voluntary  
17 cooperation offers a corporation an opportunity to avoid extended formal investigation and  
18 enforcement litigation by the SEC, the possibility of leniency for prior misdeeds, and an  
19 opportunity to narrow the issues in any resulting litigation.”); *In re Subpoenas Duces Tecum*, 738  
20 F.2d 1367, 1372 (D.C. Cir. 1984) (“[The company] independently and voluntarily chose to  
21 participate in a thorough disclosure program, in return for which it received the *quid pro quo* of  
22 lenient punishment for any wrongdoings exposed in the process. That decision was obviously  
23 motivated by self-interest.”); *In re Sealed Case*, 676 F.2d 793, 822-23 (D.C. Cir. 1982)  
24 (cooperating corporation “necessarily decides that the benefits . . . outweigh the benefits of  
25 confidentiality for all files necessary to a full evaluation of its disclosures. It forgoes some of the  
26 traditional protections of the adversary system in order to avoid some of the traditional burdens  
27 that accompany adversary resolution of disputes, especially disputes with such formidable  
28 adversaries as the SEC.”).

1 That a corporation's self-interested decision to share otherwise privileged materials with  
 2 the government carries with it well-known consequences, such as a waiver of privilege in other  
 3 litigation, does not make the company's decision to cooperate involuntary. *See In re Qwest*  
 4 *Commc'ns Int'l Inc. Sec. Litig.*, 450 F.3d 1179, 1199 (10th Cir. 2006) (declining to adopt  
 5 selective waiver theory; rejecting argument that in current regulatory environment "companies  
 6 facing federal investigations do not choose to waive their privileges"); *Steinhardt Partners*,  
 7 9 F.3d at 236 ("An allegation that a party facing a federal investigation and the prospect of a civil  
 8 fraud suit must make difficult choices is insufficient justification for carving a substantial  
 9 exception to the waiver doctrine.").

10 Despite this unwavering authority, KLA claims that the so-called "Thompson  
 11 Memorandum,"<sup>9</sup> which dates from early 2003 and was in force at the time that KLA agreed to  
 12 hand over purportedly privileged documents to the SEC and the DOJ, somehow fundamentally  
 13 changed the nature of a corporation's decision whether to waive privilege by providing protected  
 14 materials to the government. The Thompson Memorandum provided that federal prosecutors  
 15 could consider a company's willingness to waive the attorney-client privilege and the work  
 16 product protection as one factor in determining whether the corporation had cooperated with a  
 17 government inquiry.<sup>10</sup> The Thompson Memorandum, however, was not novel in permitting the  
 18 government to consider a corporation's willingness to voluntarily waive privilege in connection  
 19 with evaluating the corporation's cooperation. The language in the Thompson Memorandum  
 20  
 21

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22 <sup>9</sup> See Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department  
 23 Components and United States Attorneys, dated January 20, 2003 (attached as exhibit 1 to the  
 24 Declaration of John H. Hemann in support of Non-Party KLA-Tencor Corporation's Opposition  
 to Kenneth L. Schroeder's Motion to Compel, dated August 1, 2008 ("Hemann Decl.") (docket  
 no. 87)).

25 <sup>10</sup> Section VI.B of the Thompson Memorandum provides, in pertinent part: "One factor the  
 26 prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the  
 27 completeness of its disclosure, including, if necessary, a waiver of the attorney-client and work  
 28 product protections . . ."). The corporation's cooperation was, in turn, one of nine factors to be  
 considered under the Thompson Memorandum in evaluating whether to charge a corporation with  
 wrongdoing. *See* Thompson Mem. § II.A.



1 concerning waivers of privilege was taken almost verbatim from the “Holder Memorandum,”<sup>11</sup> its  
 2 predecessor, which dates back to June 1999. Nor does the Thompson Memorandum’s discussion  
 3 of waiver indicate that a waiver is necessary to a finding of cooperation. To the contrary, it  
 4 expressly disclaims any such requirement.<sup>12</sup> As the above-cited cases demonstrate, federal courts  
 5 had recognized, long before the Thompson Memorandum, the cost-benefit analysis inherent in a  
 6 corporation’s decision about whether to waive privilege. Accordingly, the Thompson  
 7 Memorandum was not, as KLA would have the Court believe, a sweeping, unprecedented shift in  
 8 the DOJ’s position on privilege waivers, and federal law provides no precedent for KLA’s  
 9 position that a government request for privileged documents is inherently coercive. Notably,  
 10 KLA is unable to cite to a single federal case holding that a corporation’s agreement to waive  
 11 privilege in connection with a government investigation was coerced or involuntary.

12 KLA’s position was apparently born when drafting its opposition brief. Throughout its  
 13 meet-and-confer discussions with Mr. Schroeder, KLA took the seemingly contrary position —  
 14 which it paradoxically continues to press in its opposition to the Motion to Compel — that KLA  
 15 produced documents to the SEC in furtherance of its “common interest” with the agency. *See*  
 16 *Coopersmith Decl. Ex. 14*. KLA’s coercion argument rests entirely on a California state case,  
 17 *Regents of the University of California v. Superior Court*, 81 Cal. Rptr. 3d 186, 2008 WL  
 18 2908123 (Cal. App. 2008), which was (not coincidentally) decided just two days before KLA  
 19 filed its opposition to the Motion to Compel. In *Regents*, the court ruled that certain disclosures  
 20 made by a group of energy suppliers to a joint task force composed of the DOJ and other agencies  
 21 did not waive the attorney-client privilege and work product protection under California’s  
 22 Evidence Code because, in light of the Thompson Memorandum, the disclosures were “coerced”

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23  
 24 <sup>11</sup> *See* Memorandum from Eric Holder, Deputy Attorney General, to All Component Heads and  
 25 United States Attorneys, dated June 16, 1999, *available at*: <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>.

26 <sup>12</sup> *See* Thompson Mem. § VI.B (“The Department does not, however, consider waiver of a  
 27 corporation’s attorney-client and work product protection an absolute requirement, and  
 28 prosecutors should consider the willingness of a corporation to waive such protection when  
 necessary to provide timely and complete information as one factor in evaluating a corporation’s  
 cooperation.”).

1 within the meaning of the California Evidence Code. *Id.* In finding the production involuntary,  
 2 the Court focused in particular on the fact that the companies did not have a “cost-free” decision  
 3 about whether to waive the privilege by providing the government agencies with requested  
 4 documents. *Id.*

5 Regardless of whether *Regents* represents an accurate statement of California law, that  
 6 case is demonstrably at odds with longstanding federal law. As explained above, federal law has  
 7 long recognized that corporations facing investigations may be required to make difficult  
 8 decisions, including whether to waive privilege in order to secure favorable treatment from the  
 9 government. That such decisions are not “cost-free” does not, as a matter of law, render them  
 10 involuntary. *Steinhardt Partners*, 9 F.3d at 236. Thus, KLA’s reliance on *Regents* is misplaced.

11 Moreover, KLA has provided the Court with no factual record that could establish that the  
 12 SEC or the DOJ in any way coerced it to produce privileged documents. KLA submits only its  
 13 counsel’s generic declaration that: (1) the Thompson Memorandum and the SEC’s Seaboard  
 14 Report were in effect in 2006; (2) the SEC and the DOJ each asked KLA to produce categories of  
 15 documents that included privileged information; and (3) KLA therefore “determined that it was  
 16 effectively required” to produce privileged documents. Hemann Decl. ¶ 5.<sup>13</sup> The Tenth Circuit  
 17 has previously rejected similar arguments, unsupported by evidence of *actual* coercive conduct,  
 18 that the Thompson Memorandum was somehow inherently coercive. *See Qwest Commc’ns*, 450  
 19 F.3d at 1199. Indeed, a ruling that KLA’s production of documents to the government was  
 20 involuntary based on the non-existent factual record that KLA has provided the Court would  
 21 mean that no production of privileged documents at the request of government investigators could  
 22 ever amount to a waiver. In effect, KLA is inviting the Court to create a broad selective waiver  
 23

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24 <sup>13</sup> The total absence of *any* facts to support KLA’s claim that it had “no effective choice” but to  
 25 provide privileged documents to the SEC and the DOJ is one of several reasons that KLA’s  
 26 citation to *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), is completely inapposite.  
 27 In *Stein*, the court relied on an extensive factual record of heavy-handed, coercive tactics on the  
 28 part of the government attorneys investigating the case. *See id.* at 340-52. *Stein* is also  
 distinguishable from this case because it did not deal at all with privilege and waiver issues, but  
 was instead concerned with the defendant individuals’ rights to due process and assistance of  
 counsel.

1 doctrine through the back door. This is precisely what the *Qwest Communications* court refused  
 2 to do. *See id.* (“Even though common sense and human nature suggest there is some level of  
 3 pressure for companies to satisfy the government by disclosing as much as possible, including  
 4 even privileged and protected material, this court cannot rely on such a sparse record to recognize  
 5 a new doctrine of selective waiver or to create a new privilege for government investigations.”).<sup>14</sup>  
 6 The Court should reject KLA’s claim that it did not voluntarily produce privileged documents to  
 7 the SEC.

8 **b. KLA Did Not Have A “Common Interest” With The Government**

9 KLA continues to claim — notwithstanding its new argument that it had no choice but to  
 10 produce purportedly privileged documents to the SEC and the DOJ — that its production did not  
 11 waive the attorney-client privilege or work product protection because it had a “common interest”  
 12 with the government that it apparently wanted to further (despite coercion) in identifying  
 13 wrongdoers at the Company. KLA fails to address, let alone distinguish, the numerous cases —  
 14 including three cases from this district — cited in the Motion to Compel that unequivocally  
 15 establish that a company under investigation by federal investigators does not have a common  
 16 interest with the investigating agency that would allow it to disclose privileged information to the  
 17 government without waiving the privilege. *See* Motion to Compel at 31-32; *see also In re Stone*  
 18 *Energy Corp.*, No. 05-2088, 2008 WL 3836657, \*7 (W.D. La. Aug. 14, 2008) (holding that SEC  
 19 was adverse to company when conducting informal inquiry; “Even though the SEC inquiry did  
 20 not result in any formal proceedings against Stone, the presence of their adversarial relationship  
 21 does not depend on the existence of litigation.”).

22 The authorities on which KLA relies for its common interest claim are, for the most part,  
 23 irrelevant to this case. *United States v. AT&T*, 642 F.2d 1285 (D.C. Cir. 1980), involved the  
 24

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25 <sup>14</sup> KLA additionally claims that the facts (1) that the DOJ has changed its policies and (2) that  
 26 proposed legislation would bar federal agencies from seeking privilege waivers, validate its  
 27 argument that its production of documents in this case was coerced. *See* KLA Opp. at 20-22. As  
 28 the *Qwest Communications* court found, however, that a legislative “fix” may be in the works  
 counsels *against* the creation of sweeping judicial exceptions to the ordinary rules of waiver. 450  
 F.3d at 1200-01.

1 sharing of documents between MCI and the government, where they were both pursuing antitrust  
 2 actions against a common adversary, AT&T. *Id.* at 1300. No governmental investigation into  
 3 MCI's conduct was involved. *Modesto Irrigation District v. Gutierrez*, No. 1:06-cv-00453 OWW  
 4 DLB, 2007 WL 763370, \*15-18 (E.D. Cal. March 9, 2007), is even more inapposite, as that case  
 5 involved communications *among* government agencies. KLA also relies on *In re Cardinal*  
 6 *Health, Inc. Sec. Litig.*, No C2 04 575 ALM, 2007 WL 495150, \*9 (S.D.N.Y. Jan. 26, 2007).  
 7 *Cardinal Health's* minority position has been rejected by nearly all federal courts that have  
 8 considered the issue.<sup>15</sup>

9 **c. KLA Cannot Selectively Waive The Attorney-Client Privilege**

10 As with its "common interest" argument, KLA devotes little space to its argument that this  
 11 Court should recognize the so-called "selective waiver" doctrine and hold that KLA's disclosures  
 12 to the SEC and the DOJ did not waive any applicable privilege as to third-parties. *See* KLA Opp.  
 13 at 23-25. Although KLA cursorily claims that the law on selective waiver is "unsettled," and a  
 14 "mixed bag," KLA Opp. at 18, KLA cites to almost no authority that actually supports its  
 15 selective waiver argument, while it simply ignores the many cases that have rejected the selective  
 16 waiver doctrine on indistinguishable facts. *See* Motion to Compel at 32-37. In addition, since  
 17 Mr. Schroeder filed his Motion to Compel, additional federal district courts have rejected the  
 18 doctrine of selective waiver. *See Stone Energy*, 2008 WL 3836657 at \*6, 8 (rejecting selective  
 19 waiver and noting that "it is clear that the doctrine of selective waiver has been roundly rejected  
 20 by most courts which have considered it").

21 The primary cases that KLA relies upon do not support its claim that this Court should  
 22 disregard the broad federal consensus rejecting selective waiver. In *In re Grand Jury Subpoena*

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23 <sup>15</sup> In addition, *Cardinal Health* is distinguishable from this case. The *Cardinal Health* court  
 24 recognized a distinction between the Company and its Audit Committee, which was conducting  
 25 the internal investigation. *See id.* at \*9. In this case, however, KLA's agreement to produce  
 26 documents to the SEC was made by Company counsel (not counsel for KLA's Special  
 27 Committee) on behalf of both the Company and the Special Committee, and Skadden has stated  
 28 that the Company, not the Special Committee, produced documents to the SEC in this case. *See*  
 Confidentiality Agreement between KLA and the SEC, dated October 12, 2006 (Coopersmith  
 Decl. Ex. 6); letter from Matthew Sloan to Shirli F. Weiss, dated December 27, 2007  
 (Coopersmith Decl. Ex. 19).

1 Dated July 13, 1979, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979) the issue decided by the court  
 2 was actually one of *subject matter* waiver.<sup>16</sup> *In re M & L Business Machine Co.*, 161 B.R. 689  
 3 (D. Colo. 1993), to the extent it supports KLA's position, is no longer good law in light of the  
 4 Tenth Circuit's decision rejecting selective waiver in *Qwest Communications*.<sup>17</sup> *Saito v.*  
 5 *McKesson HBOC, Inc.*, No. Civ. A 18553, 2002 WL 31657622 (Del. Ch. 2002), is an  
 6 unpublished decision applying state, not federal, law, and its reasoning conflicts with the great  
 7 weight of federal authority.<sup>18</sup> Finally, Judge Whyte's decision in *In re McKesson HBOC, Inc.*  
 8 *Securities Litigation*, No. C-99-20743 RMW, 2005 U.S. Dist. LEXIS 7098 (N.D. Cal. Mar. 31,  
 9 2005), is distinguishable and, for the reasons stated in the Motion to Compel, the Court should  
 10 not follow that decision. *See* Motion to Compel at 35-36.

11 **B. The Court Should Order Skadden To Provide The Requested Discovery**

12 **1. Skadden Has Not Established That The Discovery Sought Is Protected**  
 13 **By The Work Product Doctrine**

14 As explained in Mr. Schroeder's opening brief, KLA and Skadden, as the parties seeking  
 15 to avoid disclosure, bear the burden of establishing *both* that the discovery withheld qualifies for  
 16 protection under the attorney-client privilege or the work product doctrine, and that any  
 17 applicable privilege or protection has not been waived. *See* Motion to Compel at 23-24. Skadden  
 18 has failed to demonstrate that the discovery that Mr. Schroeder seeks from it relating to the  
 19 Special Committee investigation is privileged or otherwise protected from disclosure in this  
 20 lawsuit, and the Court should therefore grant Mr. Schroeder's Motion to Compel as to the  
 21 documents and testimony sought from Skadden.

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22 <sup>16</sup> In any event, the *In re Grand Jury Subpoena* court relied almost exclusively on the Eighth  
 23 Circuit's decision in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), which  
 has been widely rejected by other courts.

24 <sup>17</sup> The *Qwest Communications* court distinguished the peculiar facts of *M & L Business Machine*,  
 25 which involved documents produced by a bank to the U.S. Attorney in connection with an  
 investigation into one of the bank's clients. *See* 450 F.3d at 1182, 1189. If read as a broad  
 26 endorsement of selective waiver, *M & L Business Machine* is inconsistent with, and implicitly  
 overruled by, *Qwest Communications*.

27 <sup>18</sup> In addition, two of the cases that KLA relies on for its selective waiver claim expressly  
 28 rejected application of the common interest exception to waiver. *See Saito*, 2002 WL 31657622  
 at \*4-5; *In re M & L Bus. Mach. Co.*, 161 B.R. at 694.

a. **Skadden Cannot Claim Work Product Protection In This Lawsuit**

Because KLA, the Special Committee, and Skadden are not parties to this lawsuit, Skadden cannot establish that *any* of the discovery that Mr. Schroeder requests from it is shielded from disclosure by the work product doctrine.

The work product protection recognized in the federal courts, codified at Federal Rule of Civil Procedure 26(b)(3), provides, in pertinent part, that a party may not discover materials “prepared in anticipation of litigation or for trial *by or for another party or its representative*,” unless the requesting party shows that it has a substantial need for the materials and cannot obtain their equivalent without undue hardship. Fed. R. Civ. P. 26(b)(3) (emphasis added). The plain, unambiguous text of Rule 26(b)(3) thus limits the application of the work product doctrine to persons who are *parties* to the litigation in which the discovery is sought. The Ninth Circuit has adopted this plain language reading of Rule 26(b)(3), and has rejected non-party attempts to claim work product protection:

Westinghouse argues that Rule 26(b)(3) does not protect materials prepared by CPUC attorneys from discovery in the present litigation, because the CPUC is not a party to the litigation between Edison and Westinghouse. We agree. Although some courts have extended the work product privilege outside the literal bounds of the rule, we conclude that *the rule, on its face, limits its protection to one who is a party (or a party’s representative) to the litigation in which discovery is sought.*

*In re Cal. Pub. Util. Comm’n*, 892 F.2d 778, 781 (9th Cir. 1989) (emphasis added). District courts in this circuit have repeatedly followed *California Public Utilities Commission* and have found that federal law does not extend work product protection to non-parties. *See United States v. Graham*, 555 F. Supp. 2d 1046, 1049-50 (N.D. Cal. 2008) (“[T]he Court declines to create a new rule expanding the work-product doctrine to cover non-parties;” rejecting claim that federal common law provides work product protection to non-parties); *Tubar v. Clift*, No. C05-1154JCC, 2007 WL 30872, \*4 (W.D. Wash. Jan. 4, 2007) (“[T]he fact that the [withholding party] does not now — nor did it in the past — represent a party to this litigation makes the work product



1 protection inapplicable.”); *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 247 (C.D. Cal. 1993) (“[T]he  
2 fact that Wymer, a non-party to the present litigation, anticipated being named in the litigation  
3 affords him no protection under 26(b)(3).”).

4 There is no dispute that KLA, its Special Committee, and Skadden are not, and have never  
5 been, parties to this litigation, and, accordingly, there is no basis under Ninth Circuit law for  
6 Skadden to assert the work product protection to block Mr. Schroeder’s discovery in this action.  
7 For this reason alone, Skadden cannot carry its burden of proof, and the Court need not even  
8 consider any of Skadden’s arguments concerning work product protection.

9 **b. Documents Created For Disclosure To The Government**  
10 **Are Not Protected By The Work Product Doctrine**

11 In the opening brief, Mr. Schroeder explained that, because KLA and the Special  
12 Committee at all times intended to share the results of the Special Committee investigation with  
13 the government, the Special Committee documents, including all notes and draft interview  
14 memoranda, could not be protected by the work product doctrine. In its opposition, Skadden  
15 claims that the Special Committee documents — and, specifically, the interview notes and draft  
16 interview memoranda — are protected work product because KLA and the Special Committee  
17 did not decide to produce the Final Interview Memoranda to the SEC and the DOJ until the  
18 Special Committee investigation was substantially complete. *See* Skadden Opp. at 11.<sup>19</sup> For the  
19 reasons stated in the Motion to Compel, Mr. Schroeder respectfully suggests that the only  
20 reasonable inference is that KLA and the Special Committee fully intended to share the results of  
21 the Special Committee investigation, including the interview memoranda, with the government  
22 from the beginning of the investigation. *See* Motion to Compel at 24-25.<sup>20</sup> KLA’s new argument  
23 that it felt “coerced” by the government certainly adds to its admission, along with its public  
24

25 <sup>19</sup> Skadden earlier states that the Special Committee was substantially complete no later than  
26 September 27, 2006. Skadden Opp. at 5.

27 <sup>20</sup> In any event, even accepting Skadden’s assertions, the work product protection would not  
28 apply to any notes or draft interview memoranda created after September 27, 2006, and the Court  
should order Skadden to produce all such documents immediately.

disclosures of full cooperation, that it always intended to turn over the results of its investigation to the government. Certainly the fact that the SEC took little testimony in the case before filing and waited to receive the results of KLA's investigation indicates that KLA led the SEC to believe it would turn the results of its interviews over to it.

**2. The Notes, Draft Interview Memoranda And Testimony That Mr. Schroeder Seeks Are, If Anything, "Fact" Work Product**

Neither KLA nor Skadden disputes the well-established principle that where there is a waiver of the attorney-client privilege or "fact" work product protection through disclosure, the waiver extends beyond the documents and communications actually disclosed to encompass the entire subject matter of the disclosures.<sup>21</sup> Skadden argues, however, that the subject matter waiver doctrine does not require it to produce to Mr. Schroeder the notes of its interviews with current and former KLA employees, officers, and directors and the draft interview memoranda based on those notes, or to permit its attorneys to testify about the notes and memoranda. Skadden claims that the notes, draft interview memoranda, and testimony that Mr. Schroeder seeks are not subject to disclosure because they represent, in their entirety, "opinion" work product that is not susceptible to subject matter waiver.

Although Skadden makes sweeping statements in its opposition brief that attorney notes and drafts are *always* entitled to protection as opinion work product, Skadden later appears to recognize, as it must, the unremarkable proposition that factual material does not become opinion work product simply because it is in the form of attorney notes. *See* Skadden Opp. at 9-10; *Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307-08 (D.C. Cir. 1997) ("Appellees argue . . . that a lawyer's interview notes are *always* opinion work product . . . . But this proposition goes too far. We recently observed that under certain circumstances purely factual material embedded in attorney notes may not deserve the super-protection afforded to a lawyer's mental impressions."). Skadden has failed in this case to meet its burden of establishing (even assuming the notes, draft memoranda, and testimony that Mr. Schroeder seeks qualify as

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<sup>21</sup> KLA makes no arguments concerning subject matter waiver in its opposition to the Motion to Compel.



work product) that these materials fall within the category of opinion work product. *See In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 184 (2d Cir. 2005) (party seeking protection must meet “heavy burden” of showing that opinion work product protection applies). A party claiming that materials qualify as opinion work product “must show a real, rather than speculative, concern that the work product will reveal counsel’s thought processes,” and “conclusory or ipse dixit assertions” are insufficient to make the required showing. *Id.* at 183-84.

In support of its claim that the interview notes and draft memoranda are opinion work product, Skadden has submitted ten declarations from Skadden attorneys who took notes of Special Committee interviews. The declarations contain identical statements that the notes were “not verbatim transcriptions” of the interviews, but they also concede that the note-taker’s responsibility at the interviews was to “record the information provided or observations made by the witness.”<sup>22</sup> Obviously, the context of the note-taking gives rise to the only reasonable inference that the job of the Skadden note-takers was to record questions and answers. Although Skadden note-takers did not transcribe the interviews verbatim, their responsibility was simply to write down what the witness said. Thus, contrary to Skadden’s claim in its opposition, the note-takers were, in fact, “scriveners,” and their notes are, at most, fact work product. *See In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982) (ordering production of attorney interview notes; “The notes recite in a paraphrased, abbreviated form, statements by Employee A . . . To the extent that the statements imply the attorney’s questions from which inferences might be drawn as to his thinking, those inferences . . . in no way reveal anything worthy of the description ‘legal theory.’”); *In re Health S. Corp. Sec. Litig.*, 250 F.R.D. 8, 11-13 (D.D.C. 2008) (ordering production of interview notes where notes were merely “complete summaries” of the interviews and therefore contained only fact work product); *In re Initial Pub. Offering Sec. Litig.*, 249 F.R.D.

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<sup>22</sup> *See, e.g.*, Declaration of Galen D. Bellamy in support of Skadden, Arps, Slate, Meagher & Flom LLP’s Opposition to Kenneth L. Schroeder’s Motion to Compel ¶¶ 7, 9; Declaration of Elizabeth A. Harlan in support of Skadden, Arps, Slate, Meagher & Flom LLP’s Opposition to Kenneth L. Schroeder’s Motion to Compel ¶¶ 7, 9; Declaration of Lanelle K. Meidan in support of Skadden, Arps, Slate, Meagher & Flom LLP’s Opposition to Kenneth L. Schroeder’s Motion to Compel ¶¶ 7, 9.

1 457, 465 & n.64 (S.D.N.Y. 2008) (finding interview memoranda fact work product where  
 2 memoranda “were not intended to be verbatim recitals of the interviewees’ statements, but [we]re  
 3 factual summaries of those statements as memorialized by outside counsel”); *see also* Motion to  
 4 Compel at 30. Exhibit 1 to the Weiss Declaration. is an example of one of Skadden’s interview  
 5 memoranda, and, although it contains “boilerplate”<sup>23</sup> about opinions and mental impressions,  
 6 upon reading the memorandum it is clear that this is untrue and the memorandum actually  
 7 contains only factual information about what the witness said. The notes underlying the  
 8 memoranda are even less likely to contain opinion work product, as they were prepared in real  
 9 time by the Skadden note-taker during the interviews.

10 In addition, if the notes did not record questions and answers, how was it that the Final  
 11 Interview Memoranda purport to relay a summary of statements the witnesses made? Skadden  
 12 further claims that, even though the note-takers were charged with “record[ing] the information  
 13 provided or observations made by” the interviewees, the notes nevertheless qualify as opinion  
 14 work product because the note-takers used their background knowledge of the facts and “legal  
 15 theories” of the investigation as a “filter” and “sifted” through the statements made during the  
 16 interview to record only those statements that, “in their judgment,” they deemed to be sufficiently  
 17 important to write down. Skadden Opp. at 10. This appears to be an admission that the Skadden  
 18 lawyers selected which answers they wanted to record. If Skadden’s statements that its note-  
 19 takers selectively recorded the witness’s statements in light of Skadden’s “legal theories” are true  
 20 and are not (as is more likely the case) mere “puffing” intended to elevate notes that simply  
 21 summarize what an interviewee said to the level of opinion work product, then Skadden’s  
 22 investigatory process would appear to be deeply flawed, and this is useful impeachment should  
 23 the government decide to call Skadden lawyers as witnesses. (The SEC noticed a Skadden  
 24 lawyer who took notes at Mr. Schroeder’s interview as its first witness.) Moreover, if the mere  
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26 <sup>23</sup> Skadden does not appear to dispute the argument from Mr. Schroeder’s Motion to Compel that  
 27 the boilerplate recitals appended to each of the Final Interview Memoranda are irrelevant to the  
 28 determination of whether the notes and memoranda qualify as “opinion” work product. *See*  
 Motion to Compel at 30 n.23.

1 fact that a lawyer-scrivener knew something about the case were enough to transform notes into  
2 opinion work product, it is hard to see how any attorney notes could ever be fact work product.

3       Regardless of how Skadden attempts to characterize the interview notes and draft  
4 interview memoranda, however, the Court cannot be required to simply accept on faith Skadden's  
5 claims that the entirety of the notes and draft interview memoranda contain nothing but the  
6 opinions and mental impressions of its associates. Skadden, as the party that bears the burden of  
7 establishing the applicability of the "opinion" work product protection, should, at a minimum, be  
8 required to submit the notes and drafts that it is withholding to the Court for *in camera* review. *In*  
9 *re Grand Jury Subpoena*, 510 F.3d at 184 (stating that party should have submitted claimed work  
10 product for *in camera* review — "a practice both long-standing and routine in cases involving  
11 claims of privilege" — so that district court could have determined whether material contained  
12 opinion work product and whether any opinion work product could be separated from pure fact  
13 work product) (quotation omitted); *In re Intel Corp. Microprocessor Antitrust Litig.*, No. 05-441-  
14 JJF, 2008 WL 2310288, \*15 (D. Del. June 4, 2008) (adopting opinion of Special Master who  
15 determined, after *in camera* review, that opinion work product could be "easily separated" from  
16 fact work product subject to production). As Mr. Schroeder has previously informed Skadden,  
17 Mr. Schroeder really has no interest in the mental impressions of Skadden's attorneys, and  
18 Mr. Schroeder will not object if the Court causes to be redacted after its (or a Special Master's)  
19 review, any actual mental impressions or opinion work product from the notes and draft interview  
20 memoranda before production, although on the present record it does not appear that there would  
21 be anything to redact.

22       Skadden also asserts that Mr. Schroeder should not be permitted to obtain any testimony  
23 from the Skadden attorneys who took notes at the Special Committee interviews and who drafted  
24 the interview memoranda that were eventually produced to the government. Having waived any  
25 work product protection as to the subject matter of the Final Interview Memoranda produced to  
26 the government, including the interview notes and draft interview memoranda, Skadden cannot  
27 now block Mr. Schroeder from questioning the note-takers about the statements written in the  
28 notes, drafts and Final Interview Memoranda.

1 *United States v. Nobles*, 422 U.S. 225 (1975), is instructive. In that case, the district court  
 2 barred a defense investigator from testifying as to statements that several prosecution witnesses  
 3 had made to him during his investigation (the witnesses denied at trial having made the  
 4 statements in question) when defense counsel refused to provide the prosecution with a copy of  
 5 the investigator's contemporaneous report. The Supreme Court held that the district court  
 6 correctly barred the testimony because the defense waived any work product protection for all  
 7 matters relating to the investigator's testimony. *See id.* at 239-40 ("Respondent, by electing to  
 8 present the investigator as a witness, waived the privilege with respect to matters covered in his  
 9 testimony. Respondent can[not] . . . advance the work-product doctrine to sustain a unilateral  
 10 testimonial use of work-product materials . . ."). The same principle requires that Mr. Schroeder  
 11 be permitted to examine the authors of the Final Interview Memoranda that were produced to the  
 12 government, if necessary. Those memoranda are affirmative representations by Skadden about  
 13 what the witnesses said in the Special Committee interviews, and Mr. Schroeder must be  
 14 permitted to inquire into the statements contained therein.

15 None of the cases that Skadden cites for its claim that its attorneys cannot be required to  
 16 provide testimony are remotely similar to this case. Indeed, almost none of Skadden's cases even  
 17 addressed claims that the work product protection had been waived.<sup>24</sup> The lone case that did  
 18 involve waiver arguments, *In re Linerboard Antitrust Litigation*, 237 F.R.D. 373 (E.D. Pa. 2003),  
 19 did not involve a situation, like here, where work product protection had already been waived  
 20 through the production of attorney memoranda concerning the very subject about which  
 21 testimony was sought. Accordingly, Skadden cannot refuse to permit to permit Mr. Schroeder to  
 22 obtain the testimony of the Skadden attorneys concerning the statements in the interview  
 23 memoranda that they authored.

### 24 **3. Mr. Schroeder Is Entitled To All Of The Discovery That He Seeks** 25 **Under the Subject Matter Waiver Doctrine**

26  
 27 <sup>24</sup> For that reason, *Hickman v. Taylor*, 329 U.S. 495 (1947), *In re Sealed Case*, 856 F.2d 268  
 28 (D.C. Cir. 1988), *In re Hughes*, 633 F.2d 282 (1980), and *Coleman v. General Electric Co.*, No.  
 94-CV-4740, 1995 WL 358089 (E.D. Pa. June 8, 1995), are inapposite.

1 As noted above, Skadden does not appear to dispute that principles of subject matter  
 2 waiver apply to “fact” work product. Skadden claims, however, that the Court should decline to  
 3 find a subject matter waiver in this case because no unfairness will result from denying  
 4 Mr. Schroeder the additional discovery that he seeks, even accounting for the massive waiver of  
 5 privilege that has occurred in this case. Skadden asserts that because Mr. Schroeder has copies of  
 6 the documents that it produced to the SEC, Mr. Schroeder stands on a “level playing field” with  
 7 the SEC. Skadden Opp. at 13.

8 Mr. Schroeder has most certainly not been placed on a level playing field with the SEC  
 9 simply because he now has copies of the documents that KLA and the Special Committee  
 10 produced to the government. KLA gave the SEC unfettered access to interview at least one key  
 11 witness (and likely numerous others<sup>25</sup>), whom the Company affirmatively instructed not to invoke  
 12 the attorney-client privilege or the work product doctrine when speaking with the SEC,<sup>26</sup> nearly  
 13 two years ago, very near the time of the Special Committee investigation and when there was far  
 14 less risk of faded memories.<sup>27</sup> The Special Committee also made numerous presentations to the  
 15 SEC and the DOJ, during which the Special Committee certainly shared additional work product  
 16 with the government.<sup>28</sup> Mr. Schroeder, of course, had no such access, and principles of fairness  
 17 require that Mr. Schroeder now be permitted access to the source of information that most closely  
 18 reflects what the witnesses actually said at the time of their interviews — the interview notes —  
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21 <sup>25</sup> In September 2007, counsel for the SEC informed counsel for Mr. Schroeder that the SEC and  
 22 the DOJ had jointly interviewed a number of witnesses in this case. There is no reason to believe  
 23 that KLA instructed any of those witnesses to withhold information from the SEC and DOJ on the  
 24 basis of privilege. *See* Motion to Compel at 8-9 (excerpting June 2007 KLA PowerPoint  
 25 presentation to SEC describing KLA’s broad waiver of privilege in connection with SEC  
 26 investigation).

27 <sup>26</sup> KLA told counsel for Mr. Nichols that he “should not” invoke the attorney-client privilege or  
 28 work product protection during Mr. Nichols’ interview with the SEC and the DOJ. *See* Motion to  
 Compel at 6-7 & n.8.

<sup>27</sup> Because of the amount of time that has elapsed since witnesses were interviewed by the  
 Special Committee — over two years in many cases — it is no answer to claim that  
 Mr. Schroeder’s ability to depose those witnesses in the future cures the unfairness in this case.

<sup>28</sup> *See* Motion to Compel at 9.

1 and not be limited to the edited, “polished,” Final Interview Memoranda.<sup>29</sup> Thus, to the extent  
 2 that fairness considerations are relevant for determining the scope of a subject matter waiver of  
 3 the work product protection, they weigh heavily in favor of disclosure in this case. Because KLA  
 4 and its Special Committee broadly disclosed to the government purportedly privileged  
 5 information relating both to KLA’s historical stock option granting practices and to the Special  
 6 Committee’s investigation into those practices, the subject matter waiver extends to *all* attorney-  
 7 client communications and “fact” work product relating to the Special Committee investigation.  
 8 *See* Motion to Compel at 28-31.

9 Skadden attempts to distinguish *Ryan v. Gifford*, No. 2213-CC, 2007 WL 4259557 (Del.  
 10 Ch. Nov. 30, 2007), by claiming that the *Ryan* court actually rejected the application of subject  
 11 matter waiver to all communications about a special committee investigation and found instead  
 12 only a very limited subject matter waiver. *See* Skadden Opp. at 20-21. *Ryan* itself affirmatively  
 13 contradicts Skadden’s claim. The *Ryan* court specifically held that, based on the Company’s  
 14 privilege waiver, plaintiffs were “entitled to all communications between Orrick and the Special  
 15 Committee *related to the investigation and final report*.” *Id.* at \*3 (emphasis added); *see also*  
 16 *Ryan v. Gifford*, No. 2213-CC, 2008 WL 43699, \*4 (Del. Ch. Jan. 2, 2008) (denying request to  
 17 certify interlocutory appeal and summarizing earlier decision; “[T]he Court ruled that Maxim, its  
 18 Special Committee, and Orrick must produce all material related to the Special Committee’s  
 19 investigation that were withheld on grounds of attorney-client privilege.”).

20 Further, it is crucial in the circumstances of this case that Mr. Schroeder be provided with  
 21 the Special Committee interview notes that Skadden is withholding. As previously noted, the  
 22 SEC plans to take the deposition of Skadden note-taker Elizabeth Harlan to testify as to what  
 23 Mr. Schroeder purportedly said at this Special Committee interview. *See* Motion to Compel at  
 24 22. Skadden has stated it is not planning to block the SEC’s inquiry. In cross-examining  
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26 <sup>29</sup> In addition, the SEC took no investigative testimony in this case, likely because the SEC relied  
 27 so heavily on KLA’s own investigation. In the ordinary case where the SEC takes such  
 28 testimony, the defendant has access to the transcripts of that testimony, the record of what the  
 witness actually said.



Ms. Harlan, Mr. Schroeder must have Ms. Harlan's own statement (the notes), not just the final, edited versions of the interview memoranda that Skadden produced to the government. The same is true for Skadden's interviews of percipient witnesses other than Mr. Schroeder. To prepare for the upcoming depositions of current and former KLA directorsofficers, and employees, Mr. Schroeder must have the versions of their statements that are closest to what these witnesses actually said. Moreover, in developing impeachment evidence, Mr. Schroeder must have access to the notes so that, if necessary, he could call Skadden note-takers under Federal Rule of Evidence 613, and be certain that the note-takers could testify or be refreshed as to what actually was said. Only the notes are useful and adequate for this clearly legitimate purpose.

**4. Skadden Must Also Produce Any Documents Shared With KLA's Independent Auditors**

KLA's disclosure of documents to its outside auditor, PwC, provides an additional and independent waiver of the attorney-client privilege and work product protection as to the subject matter of any documents so disclosed. *See* Motion to Compel at 37-39. Skadden and KLA do not dispute that KLA has waived any claim of attorney-client privilege by providing documents to PwC. Skadden argues, however, that production of documents to PwC does not waive the work product protection because PwC was not adversarial to KLA. *See* Skadden Opp. at 17-20. Although federal courts are divided on this question, the better view, particularly in the current regulatory environment, is as the cases cited in the Motion to Compel make clear, that the relationship between a corporation and its independent auditor is such that the work product protection is waived upon disclosure to the auditor. As the United States Supreme Court has stated,

the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's . . . stockholders, as well as to [the] investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

*United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). The independent auditor thus shares no common interest with, and indeed may be adversarial to, the corporation. *See Medinol*,

1 *Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 116 (S.D.N.Y. 2002) (“[A]s has become crystal  
 2 clear in the face of the many accounting scandals that have arisen as of late, in order for auditors  
 3 to properly do their job, they *must* not share common interests with the company they audit.”);  
 4 *Diasonics Sec. Litig.*, No. C-83-4584-RFP (FW), 1986 WL 53402, \*1 (N.D. Cal. June 15, 1986).

5 Accordingly, KLA and the Special Committee waived any privilege or protection over all  
 6 documents shared with PwC, and the Court should order them produced to Mr. Schroeder.

### 7 **III. CONCLUSION**

8 For all of the reasons stated above, and for the reasons stated in his opening brief,  
 9 Defendant Kenneth L. Schroeder respectfully requests that the Court grant the Motion to Compel  
 10 in its entirety.

11  
 12 Dated: August 26, 2008

Respectfully submitted,

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 14  
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